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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,795

FRANK H. HILLS, ET AL., APPPELLANTS

vs.

COLONEL EISENHART, ET AL., APPELLANTS

Appeal from the United States District Court for the Northern District of California, Northern Division.

(PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

At a stated term, to wit: The October Term, 1957, of the United States Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Friday, the twenty-second day of November, in the year of our Lord one thousand nine hundred and fifty-seven.

Present:

Honorable ALBERT LEE STEPHENS, Chief Judge, Presiding,
Honorable CLIFTON MATHEWS, Circuit Judge,
Honorable WALTER L. POPE, *Circuit Judge*,

No. 15795

FRANK H. HILLS, ET AL., APPELLANTS

vs.

COLONEL EISENHART, ET AL., APPELLEES

ORDER ON APPLICATION FOR RESTRAINING ORDER, ETC.

ORDERED motion for temporary restraining order proceeded by Mr. Thomas W. Martin, counsel for Appellants in and by Mr. C. Elmer Collett; and Mrs. Joseph Bertain, Assistant United States Attorney, counsel for appellees in and submitted to the court for consideration and decision.

On consideration thereof, IT IS ORDERED that typewritten briefs on the merits be served and filed by the respective parties, prepared as required by Rule 18, as follows: brief of appellant within ten days; brief for appellees within ten days thereafter; the cause is assigned for hearing on the merits on December 16, 1957, 10:00 A.M., at San Francisco, California; cause to be heard on the original certified transcript.

Appellants are required to post a further supersedeas bond in the amout of $1,000.00 within five days from date.

IT IS FURTHER ORDERED that the temporary restraining order be continued in force and effect until December 16, 1957.

R. 64

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from proceedings of Monday, December 16, 1957.

Before: STEPHENS, Chief Judge, MATHEWS and POPE, Circuit Judges.

ORDER OF SUBMISSION

On motion of Mr. Thomas Martin, ORDERED, motion of Federal Employees Veterans Association to file brief Amicus Curiae, submitted to the court for consideration and decision.

On consideration whereof, IT IS ORDERED that leave be, and hereby is granted to file the aforementioned brief.

IT IS FURTHER ORDERED appeal herein argued by Mr. Thomas Martin, counsel for the appellants, and Mr. Claude L. Dawson, National Judge Advocate, Federal Employees Veterans Association, as Amicus Curiae, and by Mr. G. Joseph Bertain, Assistant United States Attorney, counsel for the appellees, and submitted to the court for consideration and decision.

R. 65

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, June 17, 1958.

Before: STEPHENS, Chief Judge, MATHEWS and POPE, Circuit Judges.

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDINGS OF JUDGMENT.

ORDERED that the typewritten opinion, and dissenting opinion of Pope, Circuit Judge, this day rendered by this court in above cause be forthwith filed by the Clerk, and that a judgment be filed and recorded in the minutes of the court in accordance with the opinion rendered.

R. 66

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,795

June 17, 1958

FRANK H. HILLS, CECIL LA MAR, ARTHUR D. DUNKELBURGER, CALVIN WINKLER, LLOYD BARKER, ALAN WIDENER, EUAL BLANSETT, ANDREW O. STANLEY, JAMES KING and ARTHUR BOWLAND, APPELLANTS

vs.

COLONEL EISENHART, COLONEL DALENE BAILEY, COLONEL DAVID DANIEL, COLONEL ROBERT DAVID, MAJOR JOHN DESMOND, MAJOR BRUCE L. SOOY, MAJOR LEO PURSEGLOVE, LIEUTENANT COLONEL BERNARD PASSERO and SAM BUTTURF, APPELLEES

Appeal from the United States District Court for the Northern District of California, Northern Division.

Before STEPHENS, Chief Judge, and MATHEWS and POPE, Circuit Judges.

MATHEWS, Circuit Judge.

On October 24, 1957, in United States District Court for the Northern District of California, Northern Division, appellants and two other plaintiffs brought a civil action against appellees, hereafter called defendants. The complaint alleged, in substance, that plaintiffs (appellants and their two coplaintiffs) were civilians employed in civil service positions at Travis Air Force Base; that defendants were United States Air Force officers at said base; that defendants had threatened to and would, unless enjoined, discharge plaintiffs from their positions in viola-

tion of 5 U.S.C.A. §§ 652 and 861; that there was an actual controversy between plaintiffs and defendants as to plaintiff's rights under 5 U.S.C.A. §§ 652 and 861; and that, as to each plaintiff, the matter in controversy exceeded the sum or value of $3,000 exclusive of interest and costs.

The complaint prayed for a temporary restraining order, a preliminary injunction and a permanent injunction restraining and enjoining defendants from discharging plaintiffs from their psitions; for a declaratory judgment declaring the respective rights of plaintiffs and defendants under 5 U.S.C.A. § 652 et seq.; and for such other and further relief as to the District Court might seem proper.

None of the defendants filed an answer. Instead, defendants, on November 12, 1957, filed a paper entitled "Motion to dismiss," consisting of a memorandum and a motion appended thereto. The memorandum was, in effect, a brief in support of the appended motion. The appended motion was, in effect, a motion to dismiss the action for lack of jurisdiction. On November 21, 1957, after a hearing at which no evidence was taken, the District Court filed an opinion[1] and entered a judgment which, in effect, granted the motion, dismissed the action for lack of jurisdiction and ordered plaintiffs to pay costs[2] in the sum of $880.21. This appeal is from the judgment.

The question presented is whether the District Court had jurisdiction of the action.

In determining this question, we must and do accept as true the allegations of fact in the complaint, no answer having been filed, no issue of fact having been raised or tried and no evidence having been taken. Accordingly, we accept as true the allegation that defendants had threat-

[1] Hills v. Eisenhart, D.C.N.D.Cal., 156 F. Supp. 902.

[2] See 28 U.S.C.A. § 1919.

ened to discharge plaintiffs from their positions in violation of 5 U.S.C.A. §§ 652 and 861. However, plaintiffs, if so discharged, could have appealed to the Civil Service Commission.[3] This was an adequate admistrative remedy.[4] As to whether any other administrative remedy was available to plantiffs, we express no opinion.

The complaint stated that plaintiffs had "no administrative appeal from the threatened action." What this statement meant is not clear. If it meant that plaintiffs had not appealed, it was an allegation of fact, and we accept it as true. If it meant that plaintiffs could not appeal to the Commission, if discharged in violation of 5 U.S.C.A. §§ 652 and 861, it was not an allegation of fact, but was a statement of a mere conclusion—a conclusion which we hold was incorrect.

The complaint alleged that on October 3, 1957, the Commission "advised[5] as follows: 'In reply to your recent letter,[6] you are advised that the agency's[7] determination to run a reduction in force in any particular kind of work is not appealable to the U.S. Civil Service Commission under the Retention preference regulations. An agency determination to effect a reduction in civilian personnel and to assign military personnel to carry on the duties formerly performed by civilian personnel is a problem outside our jurisdiction and is not the basis upon which

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[3] See 5 U.S.C.A. §§ 652 and 863.

[4] Johnson v. War Assets Administration, 7 Cir., 171 F. 2d 556; Johnson v. Nelson, D.C.Cir., 180 F. 2d 386; Green v. Baughman, D.C.Cir., 214 F. 2d 878; Young v. Higley, D.C.Cir., 220 F. 2d 487; Fitzpatrick v. Snyder, 1 Cir., 220 F. 2d 522; Burns v. McCrary, 2 Cir., 229 F. 2d 286.

[5] To whom this advice was given the complaint did not say.

[6] Whose letter this was the complaint did not say.

[7] What agency this was the complaint did not say.

we could accept a reduction in force appeal.'"[8] However, it is immaterial, if true, that the Commission gave this advice; for the giving of this advice could not and did not deprive plaintiffs of their right to appeal to the Commission, if discharged in violation of 5 U.S.C.A. §§ 652 and 861.

It did not appear from the complaint that plaintiffs had appealed to the Commission or had invoked any other administrative remedy. Much less did it appear that they had exhausted their administrative remedy or remedies. Instead, it appeared that they had not done so. Hence the District Court had no jurisdiction of the action.[9] This is true despite the fact—if it was a fact—that no administrative remedy was available to plaintiffs before they were discharged.[10] As to whether any such remedy was available to them before they were discharged, we express no opinion.

Judgment affirmed.

POPE, Circuit Judge.

I find myself unable to concur. The judgment below was based upon the claimed insufficiency of the allegations of the complaint, and this court sustains that action upon the stated ground that plaintiffs had not first exhausted an administrative remedy.

The statement of facts in the majority opinion is too brief to disclose the real grounds of the complaint. As I

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[8] In this advice, nothing was said about appeals by employees discharged in violation of 5 U.S.C.A. §§ 652 and 861.

[9] See cases cited in footnote 4. See also Porter v. Investors Syndicate, 286 U.S. 461; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41; Macauley v. Waterman Shipbuilding Corp., 327 U.S. 540; Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752.

[10] See cases cited in footnotes 4 and 9.

read it, the complaint undertakes to negative any suggestion that this was a reduction in force,[1] or a removal, suspension or discharge for cause. It makes plain that appellants complain because they, long time civilian civil service employees, are about to be replaced in their positions by military personnel in direct violation of the direction of the Secretary of Defense that such should not be done.

As Civil Service employees they cannot be ousted without compliance with law. Roth v. Brownell, D.C. cir., 215 F. 2d 500. Their removal by an expedient particularly prohibited by the Secretary is not only unlawful, but void.

The case of Fitzpatrick v. Snyder, 1 cir., 220 F. 2d 522, 525, cited in the majority opinion, expressly recognized the continuing validity of the rule in Wettre v. Hague, 1 cir., 168 F. 2d 825, that where "plaintiffs are able to show a clear violation of some incontestible right under a federal statute" then there need be no exhaustion of administrative remedies. We recognized the rule of the Wettre case in Dragna v. Landon, 9 cir., 209 F.2d 26, 28, as another statement of the rule of Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562.

Another reason why the failure to exhaust administrative remedies is not material here is that there were no such remedies for appellants to employ. Title 5, §§ 652 and 863 refer to discharges for cause; § 861 refers to reduction in personnel. Neither situation is presented here, and administrative remedies in those circumstances furnish no aid here. The regulations relating to Adminis-

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[1] The complaint is not too clear, and perhaps should be ordered to be made more definite. It sets out (paragraph III) an order to "effectuate a 5% reduction of civilian payroll funding", with "reduction in civilian personnel levels . . . without replacement by military personnel," and alleges (par. V) that defendants, contrary to the stated restriction replaced appellants with military personnel. See the final paragraph of this opinion.

trative Personnel relate to those other kinds of situations.[2] One looks in vain for a regulation dealing with the remedy of an employee who is simply replaced with military personnel.

In fact, the complaint shows that appellants did indeed "exhaust" this non-existent administrative remedy, for they were advised by the Civil Service Commission: "In reply to your recent letter, you are advised that the agency's determination to run a reduction in force in any particular kind of work is not appealable to the U. S. Civil Service Commission under the Retention preference regulations. An agency determination to effect a reduction in civilian personnel and to assign military personnel to carry on the duties formerly performed by civilian personnel is a problem outside our jurisdiction and is not the basis upon which we could accept a reduction in force appeal." I cannot see what more could be expected.

The result of all this is, in my view, that these appellants have rights, established by law, which they are entitled to have determined in the court below, for they have presented a justiciable issue. As in Stark v. Wickard, 321 U.S. 288, the right to a judicial determination of appellants' rights "is found in the existence of courts."[3]

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[2] Code of Federal Regulations, Title 5, Chap. I, "Civil Service Commission", particularly Parts 9 and 20.

[3] "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justicable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." 321 U.S. pp. 309-310.

For a recent expression of this view of a court's jurisdiction, see Harmon v. Brucker, ... U.S. ....., (March 3 1958):

"Generally, judicial relief is available to one who has been injured

I would remand the case for its consideration on the merits. In a case as important as this (if this case stands real protection for civilian civil service in the Defense Department is gone) I think it particularly unwise to dispose of the case on the complaint alone for the same reasons stated in Kennedy v. Silas Mason Co., 334 U.S. 249, 256-7.

(Endorsed:) Opinion and Dissenting Opinion. Filed June 17, 1958.

Paul P. O'Brien, Clerk.

Court Opinion
R. 67 to 72 incl.

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by an act of a government official which is in excess of his express or implied powers. . . . The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available."

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15795

FRANK H. HILLS, ET AL.,
Appellants,

vs.

COLONEL EISENHART, ET AL.,
Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: June 17, 1958

PAUL P. O'BRIEN, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15795

FRANK H. HILLS, ET AL.,
Appellants,

vs.

COLONEL EISENHART, ET AL.,
Appellees.

CERTIFICATE OF CLERK, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-three (73) pages, numbered from and including 1, to and including 73, to be a full, true and correct copy of the entire record of the above entitled cause in the said Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States.

ATTEST my hand and the seal of the United States Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this eighteenth day of July, 1958.

/s/ Paul P. O'Brien
(SEAL) PAUL P. O'BRIEN